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Mapping the World Wide Web: Using Calder v. Jones to Create a Framework for Analyzing When Statements Written on the Internet Give Rise to Personal Jurisdiction

Alexander B. Punger

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INTRODUCTION

In March 2007, Kathy Sierra, a well-known game developer and blogger, was scheduled to present at the Etech conference in San Diego.[1] Instead of leading her workshop, Sierra locked herself inside her home and was afraid to leave.[2] Sierra cancelled her appearance at the conference because she was the victim of a harassment campaign conducted over the Internet.[3] Her tormenters sent death threats,[4] posted threatening images,[5] and published Sierra's personal information such as her home address in Colorado and her Social Security number.[6] Sierra believes bitterness toward women with high profiles motivated the attacks against her.[7] Sierra failed to discover the identities of her harassers,[8] but one photograph was traced to a computer owned by Alan Herrell, a tech consultant in Arizona who denied making the image.[9] Sierra gave up blogging because of the attacks.[10]

The incident with Kathy Sierra has not been the only recent high profile incident of Internet harassment. Megan Meir's suicide,

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1. Greg Sandoval, *Blogger Cancels Conference Appearance after Death Threats*, CNET NEWS, Mar. 26, 2007, http://news.cnet.com/8301-10784_3-6170683-7.html.

2. *Id.*

3. *See* Don Aucoin, *Sometimes it Seems as Though Nastiness Dominates the Internet. But There Are Signs that the Web is Growing up*, BOSTON GLOBE, Feb. 21, 2009, at G15.

4. Sandoval, *supra* note 1. One post encouraged others to slit Sierra's throat. *Id.*

5. *Id.* One image depicted Sierra's face next to a noose. *Id.* The image was menacingly captioned "[t]he only thing Kathy has to offer me is that noose in her neck size." *Id.* Another photo portrayed Sierra struggling to breathe with panties stretched across her face. Victoria Murphy Barret, *Anonymity & the Net*, FORBES, Oct. 15, 2007, at 74, 80.

6. Barret, *supra* note 5, at 80.

7. Sandoval, *supra* note 1.

8. Barret, *supra* note 5, at 80. Sierra attempted to enlist the FBI, but the FBI was unresponsive. *Id.*

9. *Id.* Herrell denied making or sending the image. *Id.*

10. *See id.* Kathy Sierra's thoughtful response to the incident and her explanation of why she decided to refrain from blogging can be found on her blog. Creating Passionate Users, http://headrush.typepad.com/ (Apr. 6, 2007).

probably the most famous example, drew national attention.[11] The suicides of thirteen-year-old Ryan Halligan, of Vermont, and fifteen-year-old Jeff Johnston, of Florida, both in response to Internet harassment, also garnered national media attention.[12] Other examples abound that have not resonated at the national level.[13] Media coverage that focuses on incidents involving children may create the perception that children and teenagers are the only victims of Internet harassment, but, as Kathy Sierra's experience demonstrates, that perception is incorrect. Many school systems have had incidents of students harassing teachers and administrators.[14] Lawsuits have been filed in the business world because of statements written on the Internet as well.[15] These examples demonstrate that Internet harassment is not limited to one geographic area, social

11. *See* Christopher Maag, *A Hoax Turned Fatal Draws Anger but No Charges*, N.Y. TIMES, Nov. 28, 2007, at A23 [hereinafter *Hoax*]. Megan Meir hanged herself at the age of thirteen because her MySpace.com friend, Josh Evans, insulted her repeatedly. *Id.* Josh's final message read, "The world would be a better place without you." *Id.* Megan's story is even more tragic because Josh Evans was a fictional entity created by Lori Drew, a neighbor of the Meir's and mother of a classmate of Megan's. *Id.* Mrs. Drew created "Josh Evans" in order to monitor the relationship between Megan and her daughter. *Id.* Mrs. Drew subsequently denied creating the "Josh Evans" persona. Christopher Maag, *When the Bullies Turned Faceless*, N.Y. TIMES, Dec. 16, 2007, at ST12. Officials did not file charges against Mrs. Drew because her conduct was not illegal. *Hoax*, *supra*. As of November 2007, the Drews continued to live four houses down from the Meirs. *Id.*

12. *See* Linda T. Sanchez, Editorial, *The New Bullying Technology: Gone are the Days When Coming Home from School was a Refuge for Kids*, ST. LOUIS POST-DISPATCH, Apr. 5, 2009, at A17.

13. *See, e.g.*, Glenn Counts, *Mother Accused of Cyber Bullying Daughter's Friends*, WCNC.com, Feb. 17, 2009, http://www.wcnc.com/news/local/stories/wcnc-021709-mw-cyber_bullying.272901f1.html (reporting that Charlotte-Mecklenburg police were investigating whether a Ballantyne-area mother cyberbullied some of her daughter's friends); Rachel Dissell, *Cyberbullying has Offline Consequences—a Shooting*, CLEVELAND PLAIN DEALER, Apr. 5, 2009, at B1 (describing how one Cleveland teenager shot at another teenage girl because of an argument the two had through their MySpace accounts).

14. *See* Tresa Baldas, *Fake Online Profiles Trigger Suits*, NAT'L. L.J., June 2, 2008, at 7. For example, school administrators and town officials in Texas, Indiana, Pennsylvania, and Illinois have filed lawsuits because of statements written about them on MySpace and Facebook. *Id.*

15. *See, e.g.*, Young v. New Haven Advocate, 315 F.3d 256, 258 (4th Cir. 2002) (involving a suit brought by the warden of a Virginia prison against two Connecticut newspapers); Burleson v. Toback, 391 F. Supp. 2d 401, 404 (M.D.N.C. 2005) (involving a suit filed by a trainer of miniature horses because of statements written on an Internet web forum); Dailey v. Popma, 191 N.C. App. 64, 66–67, 662 S.E.2d 12, 14–15 (2008) (involving a suit brought by the owner of a shooting camp against a customer because of statements the customer wrote on an Internet message board).

demographic, or industry, and that Internet activity may give rise to various tort claims.[16]

While not all of the examples given involve actors across state lines, the experiences of Sierra and others prove that statements written on the Internet can have devastating effects on a target in a different state.[17] North Carolina, and every other state, has an interest in protecting its citizens from the threat of Internet harassment. Tort claims based on Internet activity will likely rise as the Internet becomes increasingly prevalent in society.[18] To protect its citizens, North Carolina courts need guidelines in order to consistently decide if long-arm jurisdiction can be exerted over an out-of-state defendant who posts defamatory statements on the Internet about a North Carolina resident.

This Recent Development will use *Dailey v. Popma*,[19] the most recent case involving Internet defamation heard by the North Carolina Court of Appeals, to examine these jurisdictional issues. In *Dailey*, the court failed to protect state residents from Internet defamation because it placed too much emphasis on the omnipresence of the Internet in the abstract when dismissing the case for lack of personal jurisdiction, rather than focusing on the specific Internet activity involved in the case.[20] The plaintiff, Jack Dailey, a North Carolina resident, claimed North Carolina had personal jurisdiction over the defendant, Donald Popma, because Popma had minimum contacts with North Carolina as a result of the defamatory

16. For a profile of a social clique that sets its social hierarchy based on the quality and number of cyberbullying attacks, see generally Mattathias Schwartz, *Inside the World of Online Trolls Who Use the Internet to Harass, Humiliate and Torment Strangers. Malwebolence*, N.Y. TIMES, Aug. 3, 2008, (Magazine), at 24.

17. For example, one of the images used to harass Sierra, a Colorado resident, was traced to a computer in Arizona. *See supra* note 9 and accompanying text; *see also Young*, 315 F.3d at 258 (deciding whether two Connecticut newspapers could be sued in Virginia because the articles discussed a Virginia prison and its warden); *Dailey*, 191 N.C. App. at 66, 662 S.E.2d at 14 (involving a North Carolina plaintiff and a Georgia defendant).

18. *See* Jaana Juvonen & Elisheva F. Gross, *Extending the School Grounds? – Bullying Experiences in Cyberspace*, 78 J. SCH. HEALTH 496, 500, 502 (2008) (finding seventy-two percent of the sample group of twelve- to seventeen-year-old children had been cyberbullied, but only ten percent reported the bullying).

19. 191 N.C. App. 64, 662 S.E.2d 12 (2008).

20. The North Carolina Court of Appeals first discussed the Internet in relation to personal jurisdiction in *Havey v. Valentine*, 172 N.C. App. 812, 816–17, 616 S.E.2d 642, 647–48 (2005). *See Dailey*, 191 N.C. App. at 70, 662 S.E.2d at 17 ("The only North Carolina case dealing with internet activity as a basis for personal jurisdiction is *Havey v. Valentine* . . . ."). *Havey* involved whether a Vermont corporation purposefully availed itself of the privilege of conducting business in North Carolina by operating a website. *See Havey*, 172 N.C. App. at 816–17, 616 S.E.2d at 647–48. It did not involve Internet defamation. *See id.*

statements he wrote about Dailey on an Internet message board.[21] The North Carolina Court of Appeals dismissed the case because it believed personal jurisdiction could not be based on Popma's Internet conduct.[22] This Recent Development asserts that the court erred in its dismissal. The court reached this decision because it failed to adapt the underlying reasoning of *Calder v. Jones*[23] to an Internet context.

In *Calder*, two Florida reporters wrote an article about a famous California actress; a national magazine, with a substantial number of its readers in California, published the article.[24] The United States Supreme Court found the defendants had minimum contacts with California because California was the focus of the story and the injury.[25] Stated simply, jurisdiction was proper because of the "effects" the defendants' Florida conduct had in California.[26]

The reasoning used in *Calder* has subsequently come to be known as the "effects" test.[27] The "effects" test[28] is essentially a short-hand way of saying minimum contacts exist, but it does not explain when one can reasonably foresee being called to a forum because of the effects of his actions. The Court found that the defendants in *Calder* targeted California with their conduct based on three factors: 1) the defendants' choice of publication medium; 2) their knowledge of where the plaintiff lived and worked; and 3) their intentional actions.[29] California could exercise jurisdiction over the Florida defendants consistent with due process requirements because

21. *Dailey*, 191 N.C. App. at 66, 662 S.E.2d at 14–15.

22. *Id.* at 75, 662 S.E.2d at 19.

23. 465 U.S. 783 (1983).

24. *Id.* at 784–85.

25. *Id.* at 789.

26. *Id.*

27. *See, e.g.*, Mullins v. TestAmerica, Inc., 564 F.3d 386, 400–02 (5th Cir. 2009) (discussing the applicability of the "effects" test to the case at issue); Licciardello v. Lovelady, 544 F.3d 1280, 1286 (11th Cir. 2008) (referring to the "effects" test); ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 622 (4th Cir. 1997) (stating the district court denied the motion to dismiss based on the "effects" test from *Calder v. Jones*); Sea-Roy Corp. v. Parts R Parts, No. 1:94CV00059, 1995 U.S. Dist. LEXIS 21859, at *30–32 (M.D.N.C. Aug. 15, 1995) (discussing the "effects" doctrine); *cf.* Cynthia L. Counts & C. Amanda Martin, *Libel in Cyberspace: A Framework for Addressing Liability and Jurisdictional Issues in this New Frontier*, 59 ALB. L. REV. 1083, 1123 (1996) (stating the "effects" test interpretation of *Calder* actually "ignores the operative facts in *Calder* which demonstrate that the defendants' contacts were not random, but quite substantial").

28. This Recent Development will use "effects" to refer to the reasoning used in *Calder*. That is, the defendant specifically targeted the forum, and thus, the forum can exert personal jurisdiction over the defendant. The word effects, without quotes, refers to the results of someone's actions.

29. *Calder*, 465 U.S. at 789–90.

the combination of the factors meant the defendants could have reasonably foreseen being haled to California.[30] These three factors will be referred to as the "*Calder* factors."

North Carolina and the Fourth Circuit use a test consistent with the reasoning in *Calder* to determine if actions on the Internet give rise to personal jurisdiction.[31] Thus, *Calder* should inform what is required to manifest intent to direct Internet communications toward a forum state.[32] Using these factors will provide guidance as to when a defendant should reasonably be able to foresee being called to a forum to answer for the effects of his Internet statements. Given that Popma chose a publication medium focused on North Carolina, knew Dailey was a resident of the state, and intentionally wrote the messages, the North Carolina Court of Appeals should have found personal jurisdiction existed in North Carolina because his statements were written on an Internet forum directed at North Carolina and the majority of their effects would be felt there.[33]

This Recent Development proceeds as follows: Part I gives a brief overview of the process North Carolina courts use to determine whether they can assert personal jurisdiction over out-of-state citizens and how North Carolina courts have adapted traditional concepts of constitutional due process to the Internet. In Part II, this Recent Development will demonstrate that, by failing to use *Calder* as a model for the test for personal jurisdiction based on Internet communications, the court in *Dailey* improperly affirmed the trial court's dismissal for lack of personal jurisdiction. Applying the "*Calder* factors" to *Dailey* will illustrate how the factors place limits on jurisdiction, thereby preventing the demise of the defense of personal jurisdiction.[34] Finally, in Part III, this Recent Development will demonstrate how the fairness factors of a traditional jurisdictional analysis support a finding that jurisdiction in *Dailey* was constitutional. Since the North Carolina Court of Appeals did not

30. *Id.* That is to say jurisdiction was proper because of the effects of the defendants' action.

31. *See* ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002) (stating that its rule is "not dissimilar" to the reasoning in *Calder v. Jones*); Havey v. Valentine, 172 N.C. App. 812, 816–17, 616 S.E.2d 642, 647–48 (2005) (adopting the rules described in *ALS Scan*).

32. This Recent Development will only discuss personal jurisdiction in an Internet context.

33. Dailey v. Popma, 191 N.C. App. 64, 66–67, 662 S.E.2d 12, 14–15 (2008).

34. The court in *Dailey* worried that allowing these Internet communications to establish personal jurisdiction would lead to the end of the defense of lack of personal jurisdiction. *Dailey*, 191 N.C. App. at 73, 662 S.E.2d at 18. These factors inherently set limits that will prevent this fear from materializing.

structure its decision on these factors, the Supreme Court of North Carolina should remand the decision so that the North Carolina Court of Appeals can conduct a more in-depth analysis of these factors, which will provide guidance for future opinions.[35]

I. NORTH CAROLINA'S PROCESS FOR OBTAINING JURISDICTION OVER OUT-OF-STATE RESIDENTS

North Carolina courts follow a two-step process to determine whether North Carolina can acquire personal jurisdiction over an out-of-state defendant. First, the court determines if the defendant comes within the reach of North Carolina's "long-arm statute."[36] If the court determines that the defendant satisfies North Carolina's long-arm statute, then the court asks whether exercising jurisdiction would "violate the due process clause of the [F]ourteenth [A]mendment to the United States Constitution."[37] Neither party disputed the applicability of North Carolina's long-arm statute in *Dailey*.[38] Thus, the only issue before the North Carolina Court of Appeals was whether the trial court correctly determined "that asserting jurisdiction over . . . [Popma] would violate due process."[39]

"To satisfy the due process prong of the personal jurisdiction analysis, there must be sufficient 'minimum contacts' between the nonresident defendant and . . . [North Carolina] 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' "[40]

A plaintiff could allege that the defendant had sufficient minimum contacts to support general or specific jurisdiction.[41] "Specific jurisdiction exists when the cause of action arises from or is

35. A remand is more appropriate than a reversal because the factual record needs to be developed before a conclusion can be reached. Furthermore, a remand would allow the court of appeals to develop the facts concerning the "*Calder* factors."

36. *See* Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986). A long-arm statute is "a statute providing for jurisdiction over a nonresident defendant who has had contacts with the territory where the statute is in effect." BLACK'S LAW DICTIONARY 961 (8th ed. 2004). For an example, see North Carolina's long-arm statute at section 1-75.4 of the General Statutes of North Carolina. N.C. GEN. STAT. § 1-75.4 (2007).

37. *Tom Togs, Inc.*, 318 N.C. at 364, 348 S.E.2d at 785.

38. *Dailey*, 191 N.C. App. at 69, 662 S.E.2d at 16.

39. *Id.*

40. Skinner v. Preferred Credit, 361 N.C. 114, 122, 638 S.E.2d 203, 210 (2006) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

41. *See id.*

related to defendant's contacts with the forum."[42] For the defendant to have minimum contacts to support specific jurisdiction, the defendant must have "purposefully avail[ed] [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[43] The United States Supreme Court provided an additional gloss for minimum contacts in *World-Wide Volkswagen Corp. v. Woodson*.[44] After *World-Wide*, courts may also describe minimum contacts as requiring that the "relationship between the defendant and the forum ... be 'such that he should reasonably anticipate being haled into court there.' "[45] The gloss used, however, does not affect the personal jurisdiction analysis; both "purposeful availment" and "reasonable anticipation" merely describe the same analysis.[46] Yet, no matter how a court describes the test for minimum contacts, finding that a defendant had minimum contacts to support specific jurisdiction is a fact-specific inquiry.[47]

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42. *Id.* at 122, 638 S.E.2d at 210 ("General jurisdiction exists when the defendant's contacts with the state are not related to the cause of action but the defendant's activities in the forum are sufficiently 'continuous and systematic.' ") (quoting Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414–16 (1984)). Dailey did not allege general jurisdiction, so it will not be discussed. *See Dailey*, 191 N.C. App. at 70, 662 S.E.2d at 16.

43. Chadbourn, Inc. v. Katz, 285 N.C. 700, 705, 208 S.E.2d 676, 679 (1974) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

44. 444 U.S. 286 (1980).

45. *See* Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 365–66, 348 S.E.2d 782, 786 (1986) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

46. *See id.* at 367, 348 S.E.2d at 787 (failing to mention whether the defendant could have reasonably anticipated being haled to North Carolina when the court found the defendant had minimum contacts with North Carolina because the defendant purposefully availed himself of the protection of North Carolina laws); Baker v. Lanier Marine Liquidators, Inc., 187 N.C. App. 711, 717, 654 S.E.2d 41, 46 (2007) (finding minimum contacts because the defendant purposefully availed itself of the protection of North Carolina law and should have reasonably anticipated being haled into North Carolina); First Union Nat'l Bank v. Bankers Wholesale Mortgage, LLC, 153 N.C. App. 248, 253–54, 570 S.E.2d 217, 221 (2002) (stating minimum contacts existed because the defendant purposefully availed itself of the right to conduct business in North Carolina without explicitly analyzing whether the defendant reasonably anticipated being haled into North Carolina).

47. *Compare* Dillon v. Numismatic Funding Corp., 291 N.C. 674, 679–80, 231 S.E.2d 629, 632–33 (1977) (stating the defendant established minimum contacts with North Carolina by making mass mailings to state residents, selling more than $50,000 worth of coins to twenty-seven different residents in 142 distinct transactions, and sending a company representative to appraise the coins of a Burlington, North Carolina resident), *and Bankers Wholesale Mortgage*, 153 N.C. App. at 253–54, 570 S.E.2d at 221–22 (finding the exercise of personal jurisdiction comports with due process because defendant registered in North Carolina as a mortgage banker, "posted a $25,000 surety bond to obtain registration," and accepted payment from plaintiff's North Carolina offices for forty-five loans it made to the plaintiff), *with Skinner*, 361 N.C. at 123–24, 638 S.E.2d at

In certain situations, a defendant may lack physical contacts with the forum, but jurisdiction may be proper if the defendant targeted the forum with his actions.[48] Jurisdiction is proper when a defendant targets the forum because a defendant can anticipate being haled to a state he targeted.[49] *Calder v. Jones* was the first instance when a court exerted specific jurisdiction over an out-of-state defendant because the defendant targeted the forum.[50] That reasoning is sometimes referred to as the "effects" test.[51] The "effects" test is simply a specialized method of demonstrating that the defendant had minimum contacts with the forum. The "*Calder* factors" are useful because they illustrate what is required for a defendant to target a forum.

Because the Internet is omnipresent, courts have adapted minimum contacts principles to analyze whether Internet conduct supports personal jurisdiction.[52] North Carolina courts use the test described in *ALS Scan, Inc. v. Digital Service Consultants*[53] as

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211, 213 (2006) (holding that the court may not exercise personal jurisdiction over a nonresident trust which holds notes secured by deeds of trust on North Carolina real property because creation of the trust occurred outside of North Carolina, day-to-day operation of the trust occurred in New York, the trust's equitable interest in North Carolina real estate was an insufficient contact, and the trust did not directly receive payments from North Carolina), Cambridge Homes of N.C., L.P. v. Hyundai Constr., Inc., __ N.C. App. __, __, 670 S.E.2d 290, 298–99 (2008) (holding that a Korean company that manufactured a resin used with vinyl siding did not have minimum contacts with North Carolina even though it injected its products into the stream of commerce because it did not initiate contact with North Carolina companies, solicit business activities in the state, or have any distributors in the state), *and* Tutterrow v. Leach, 107 N.C. App. 703, 709, 421 S.E.2d 816, 820 (1992) (holding that defendants did not have minimum contacts with North Carolina even though they entered into a contract with a state resident because they never solicited their business in the state, their only contacts with the forum state were isolated phone calls and a "handful of letters," and the plaintiff initiated contact with them).

48. *See* Calder v. Jones, 465 U.S. 783, 789–90 (1984); Retail Software Serv., Inc. v. Lashlee, 854 F.2d 18, 23–24 (2d Cir. 1988) (using *Calder* to justify allowing New York to exert personal jurisdiction over two out-of-state defendants who entered into seven franchise agreements in New York); Saxon v. Smith, 125 N.C. App. 163, 172, 479 S.E.2d 793, 793–94 (1997) (finding North Carolina could exert jurisdiction over a Virginia resident because the Virginian targeted North Carolina by distributing a newsletter in North Carolina and filing a complaint with North Carolina law enforcement).

49. *See Calder*, 465 U.S. at 789–90.

50. *Id.* at 789–91; Scotts Co. v. Aventis S.A., 2005 FED App. 0661N, ¶ 19, 145 F. App'x 109, 113 (6th Cir.) (noting the effects test was "first articulated in *Calder v. Jones*").

51. *See Calder*, 465 U.S. at 789; Counts & Martin, *supra* note 27, at 1123.

52. *See* ALS Scan, Inc. v. Digital Serv. Consultants, 293 F.3d 707, 712 (4th Cir. 2002); Irving v. Wagner Zone Inc., 68 Va. Cir. 127, 130 (Cir. Ct. 2005) (applying the test used in Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002)).

53. 293 F.3d 707, 714 (4th Cir. 2002) (creating a test to analyze whether a defendant who provided bandwidth established minimum contacts with Virginia).

modified in *Young v. New Haven Advocate*[54] to determine whether statements an out-of-state citizen wrote on the Internet constitute minimum contacts with North Carolina.[55] In *ALS Scan*, the plaintiff, a Maryland corporation, sought jurisdiction over the defendant, a Georgia-based Internet service provider, in Maryland because the defendant provided the Internet access for a website that displayed the plaintiff's copyrighted photographs.[56] The plaintiff claimed that the defendant had minimum contacts with Maryland solely because it allowed the photographs to be transmitted via the Internet to Maryland.[57] *ALS Scan* held that a state may exercise personal jurisdiction over an out-of-state defendant "when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts."[58] The court found the defendant did not have minimum contacts with Maryland because the Internet activity was not directed at Maryland.[59]

In *Young*, the United States Court of Appeals for the Fourth Circuit modified the test to better suit a situation where articles are posted on a website.[60] In *Young*, the warden of a Virginia prison sued two Connecticut newspapers in Virginia because the newspapers wrote articles criticizing how the warden ran the prison.[61] No reporter from either paper traveled to Virginia while working on the article.[62] Both papers were distributed almost exclusively in Connecticut.[63] The warden claimed that the papers had minimum contacts with Virginia because they posted the articles to their

54. 315 F.3d 256, 263 (4th Cir. 2002). Although *Young* originated in the western district of Virginia, *id.* at 259, the minimum contacts analysis is the same for any state court because it is a constitutional inquiry. *See* Skinner v. Preferred Credit, 361 N.C. 114, 122, 638 S.E.2d 203, 210 (2006); Johnston County v. R.N. Rouse & Co., 331 N.C. 88, 95–96, 414 S.E.2d 30, 34–35 (1992); Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 365, 248 S.E.2d 782, 785 (1986).

55. *See* Dailey v. Popma, 191 N.C. App. 64, 66, 662 S.E.2d 12, 14 (2008) (adopting the modification of *Young*); Havey v. Valentine, 172 N.C. App. 812, 816–17, 616 S.E.2d 642, 647–48 (2005) (adopting and modifying the test used in *ALS Scan*).

56. *ALS Scan*, 293 F.3d at 709.

57. *Id.* at 712.

58. *Id.* at 714.

59. *Id.* at 715.

60. Young v. New Haven Advocate, 315 F.3d 256, 263 (4th Cir. 2002) (modifying the *ALS Scan* test to analyze whether two Connecticut newspapers had minimum contacts with Virginia when they posted articles discussing a Virginia prison to their websites).

61. *Id.* at 259.

62. *Id.* at 260.

63. *Id.* (stating one of the papers had eight mail-order subscribers in Virginia).

respective websites, which were accessible in Virginia.[64] The court of appeals found that the test created in *ALS Scan* works better when the first and second parts of the test are combined.[65] After modifying the *ALS Scan* test, the court found that Virginia could exercise personal jurisdiction based on the Internet activity of an out-of-state defendant if the "Internet postings, manifest an intent to target and focus on . . . [the forum state's] readers,"[66] though the posts must still create a potential cause of action for a resident of the forum state.[67] The court in *Young* dismissed the warden's claim because neither the content of the websites nor the articles manifested an intent to target Virginia readers.[68] Although North Carolina previously adopted the test set out in *ALS Scan* for determining when Internet actions give rise to personal jurisdiction,[69] the court in *Dailey* recognized that the *Young* test is a refinement of the test set forth in *ALS Scan* and consequently adopted the *Young* test.[70]

Factually, *Dailey* is more similar to *Young* than *ALS Scan* because it involved the posting of written statements rather than the actions of an Internet service provider. The plaintiff, Jack Dailey, was a resident of North Carolina who operated shooting "camps" in North Carolina and Alabama.[71] The defendant, Donald Popma, was a resident of Georgia.[72] The suit arose because the defendant posted statements on an Internet bulletin board discussing the shooting camps operated by Dailey.[73] Popma admitted to posting the statements while in Georgia.[74] According to the complaint, the posts were "false and defamatory."[75] In his affidavit, the defendant

64. *Id.* at 261–62.

65. *Id.* at 263.

66. *Id.*

67. *See id.* at 263–64 (combining the first two parts of the *ALS Scan* test, but retaining part three in its original form, which requires that the defendant's actions could give rise to a cause of action in the forum state).

68. *Id.* at 264.

69. *See* Havey v. Valentine, 172 N.C. App. 812, 816–17, 616 S.E.2d 642, 647–48 (2005).

70. Dailey v. Popma, 191 N.C. App. 64, 71–72, 662 S.E.2d 12, 17–18 (2008).

71. *Id.* at 65–67, 662 S.E.2d at 14–15.

72. *Id.* at 65, 662 S.E.2d at 14.

73. *Id.* at 66–67, 662 S.E.2d at 14–15. The record did not contain the name of the bulletin board on which the statements were posted. *See id.* at 72, 662 S.E.2d at 18.

74. *Id.* at 67, 662 S.E.2d at 15.

75. *Id.* at 66, 662 S.E.2d at 14. The complaint alleges that the posts stated that the plaintiff:

> (a) committed embezzlement; (b) committed theft; (c) is a cheat and a liar; (d) is going to be wearing an orange jumpsuit; (e) is a crook; (f) committed felonies; (g) is an asshole; (h) acted clandestinely and illegally; (i) is dishonest; (j) is a devious

admitted he knew the plaintiff ran a shooting camp in North Carolina.[76]

The court in *Dailey* applied the test used in *Young* and found that the exercise of personal jurisdiction was not consistent with due process of law.[77] In reaching this decision, the court noted that something more than the " 'posting and accessibility' " of materials via the Internet is required for the defendant to have directed his activity toward the forum state.[78] The posts were not introduced into evidence and no other evidence existed that demonstrated that the defendant, through the text of the posts, targeted North Carolina readers.[79] The defendant's assertion that he understood some of the readers of the message board were not North Carolina residents further supported the finding that the defendant had not directed his statements at North Carolina because the limited participation of a few North Carolina residents does not evidence intent to target North Carolina.[80] Based on those reasons, the North Carolina Court of Appeals affirmed the decision to dismiss the case for lack of personal jurisdiction.[81]

In its decision, the court misinterpreted prior precedent that explained the relationship between *Calder* and the *ALS Scan* test. The North Carolina Court of Appeals in *Dailey* thought *Havey v. Valentine*[82] and *Burleson v. Toback*[83] precluded relying solely on the effect Internet statements had on the plaintiff when determining whether the defendant had minimum contacts with the forum.[84] The court's confusion is evidenced by the fact that it refers to effects and later to "effects."[85] Apparently, the court confused effects, what happens as a result of the defendant's actions, with "effects," where presumably the quotations mean the court is referring to the "effects"

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con man; (k) is a scumbag; (l) is the equivalent of a molester of boys; (m) will be convicted on multiple counts; (n) is extremely underhanded; (o) is a lying fraud.

Id. The record did not contain the text of the posts. *See id.* at 72, 662 S.E.2d at 18. Although the texts of the posts were not in the record, it is likely the posts made insinuations about the North Carolina activities of a North Carolina resident.

76. *See id.* at 66–67, 662 S.E.2d at 15.

77. *Id.* at 72–73, 662 S.E.2d at 18.

78. *Id.* at 71–72, 662 S.E.2d at 18 (quoting Young v. New Haven Advocate, 315 F.3d 256, 263 (4th Cir. 2002)).

79. *Id.*

80. *Id.*

81. *Id.* at 75, 662 S.E.2d at 19.

82. 172 N.C. App. 812, 616 S.E.2d 642 (2005).

83. 391 F. Supp. 2d 401 (M.D.N.C. 2005).

84. *Dailey*, 191 N.C. App. at 73–74, 662 S.E.2d at 18.

85. *Id.* at 73–74, 662 S.E.2d at 18–19.

test.[86] Both *Havey* and *Burleson* stand for the proposition that effects alone cannot create minimum contacts.[87] This proposition is consistent with *Calder*, which is why the Court in *Calder* distinguished the hypothetical welder from the defendants.[88] The actions of the hypothetical welder would have effects in foreign forums, but the effects of his actions would not constitute minimum contacts.[89] In contrast, the two defendants, by aiming their actions toward California, had minimum contacts with California, and jurisdiction was appropriate because of the "effects" of their actions.[90] The targeting of California, rather than the results of their actions, established minimum contacts in California. "Effects" signifies that a defendant targeted his actions toward a forum, not that the results of his actions were felt in a forum.[91] The court in *Dailey* failed to appreciate the persuasiveness of *Calder* because it assumed minimum contacts must exist before it could consider effects. By erroneously believing *Young* precluded using "effects," the *Dailey* court effectively treated the "effects" test as a subsequent inquiry to a minimum contacts analysis.

However, *Calder* demonstrates that the "effects" of a defendant's actions are to be used when determining whether minimum contacts exist, not as an entirely subsequent inquiry as the court in *Dailey* misconstrued it to be.[92] Illustratively, the effects felt in California, by themselves, were not dispositive in deciding the outcome in *Calder*.[93]

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86. *Id.*

87. *See Burleson*, 391 F. Supp. 2d at 416 (stating a defendant is subject to jurisdiction in places where he has minimum contacts, but not every jurisdiction where the plaintiff is injured by his actions); *Havey*, 172 N.C. App. at 816–17, 616 S.E.2d at 647–48 (quoting ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002)) (stating that a person who posts information on the Internet is not subject to jurisdiction in every state where the material is "received"). Neither *Burleson* nor *Havey* refer to effects or, more importantly, "effects." *See Burleson*, 391 F. Supp. 2d at 416; *Havey*, 172 N.C. at 816–17, 616 S.E.2d at 647–48.

88. Calder v. Jones, 465 U.S. 783, 789 (1984).

89. *Id.* at 789–90.

90. *See id.* at 789.

91. *See* Counts & Martin, *supra* note 27, at 1123.

92. *See Calder*, 465 U.S. at 789–90 (stating the maxim "jurisdiction . . . [is] proper . . . based on the 'effects,' " and then explaining the reasons why it is reasonable for defendants to go to California to answer for their effects); *see also* Counts & Martin, *supra* note 27, at 1124–25.

93. *See Calder*, 465 U.S. at 789–91 (allowing jurisdiction in California not only because of the "effects" of the reporter's actions, but also because of their intentional actions aimed at California); *see also* Dudnikov v. Chalk & Vermillion Fine Arts, 514 F.3d 1063, 1077 (10th Cir. 2008) (describing that the fact the defendant's actions had effects in the forum state has never been sufficient to support a state's exercise of jurisdiction over an out-of-state defendant); Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 731 (E.D. Pa.

The fact that the opinion continues for two more pages after the maxim "jurisdiction ... [is] proper ... based on the 'effects' "[94] illustrates that there was more to the Court's analysis than finding the defendants' actions had effects in California. The totality of the circumstances proved that the defendants targeted California.[95] Thus, they had sufficient minimum contacts with California to " 'reasonably anticipate being haled into court there' " to be held accountable for the effects of their actions.[96]

The precedents *Dailey* cites to prove that minimum contacts and "effects" are separate analyses do not prove that analyzing minimum contacts and analyzing "effects" are distinct steps; rather, the precedents demonstrate no minimum contacts existed and "effects" are irrelevant because the "*Calder* factors" were not satisfied.[97] If a defendant satisfies the "*Calder* factors," then the defendant has minimum contacts with the forum state such that jurisdiction is proper based on the "effects" of his actions.[98]

Using the "*Calder* factors" as a blueprint for determining when Internet statements create minimum contacts with a forum does not threaten traditional due process limitations on jurisdiction because

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1999) (stating that suffering harm in a location was never enough to satisfy the "effects" test).

94. *Calder*, 465 U.S. at 789.

95. *Id.* at 789–90.

96. *Id.* at 790 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)); *see* Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1485–86 (9th Cir. 1993).

97. The court in *Dailey* relied on the following cases: Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002), Machulsky v. Hall, 210 F. Supp. 2d 531 (D.N.J. 2002), *Barrett*, 44 F. Supp. 2d 717, and Griffis v. Luban, 646 N.W.2d 527 (Minn. 2002). As previously discussed, *Young* involved a website, which cannot be linked with a specific area like a magazine or a discussion of a specific entity. *Young*, 315 F.3d at 258. *Machulsky* involved statements posted on Ebay's customer feedback page. *See Machulsky*, 210 F. Supp. 2d at 533. The feedback page targeted a global audience and did not specifically target any one location. *See id.* at 542. In *Barrett*, the defendant allegedly wrote libelous statements on listservs and USENET news groups. *Barrett*, 44 F. Supp. 2d at 722. The listservs and USENET groups had from several hundred to thousands of readers scattered across the nation. *Id.* No evidence existed that the listservs or USENET groups had a plurality of readers in one state or that the defendant knew where the plaintiff lived. *See id.* The defendant in *Griffis* posted statements on an archaeology-related newsgroup about an Alabama resident plaintiff. *Griffis*, 646 N.W.2d at 530. No evidence linked the newsgroup with a particular geographic location. *See id.* As a newsgroup devoted to archaeology, it is understandable the group had no geographic focus because archaeology is not tied to any one location. The plaintiff could not prove any Alabama resident read the statement, much less that Alabama has a unique relationship with archaeology. *Id.* at 536. Since each of these precedents does not have a convergence of the three factors from *Calder*, they do not satisfy the "effects" test. Thus, the defendants do not have minimum contacts with the forum state because the "effects" test is not met.

98. *Calder*, 465 U.S. at 789–90.

Calder has an inherent minimum contacts requirement. As discussed below, the "*Calder* factors" will guide whether a defendant displayed an intent to target a state while providing limits on where jurisdiction can be obtained for Internet communications.

II. APPLYING THE "*CALDER* FACTORS" TO *DAILEY V. POPMA*

Although the requirements for personal jurisdiction have become more flexible because of technological innovations, "it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts."[99] Even though those words were written fifty years ago, they apply equally well today as the Internet allows material to be published and accessed both ubiquitously and instantly. To prevent the erosion of jurisdictional limits, North Carolina courts have adapted personal jurisdiction precedent to determine when Internet activity gives rise to jurisdiction in the forum state.[100] But in order to conduct a meaningful analysis of Internet activity, North Carolina courts need to look past what the Court said in *Calder* and look at the factors it used to find that the newspaper article at issue was directed toward California. The "*Calder* factors" can provide guidance as to what is required for a defendant to manifest an intent to direct his Internet activity at North Carolina while maintaining jurisdictional limits. If the court in *Dailey* used the "*Calder* factors," it would have likely noticed key factual differences between the situation in *Dailey* and the precedents on which it relied, and it would have ultimately concluded Popma did manifest an intent to direct his Internet posts toward North Carolina.

In *Calder*, the United States Supreme Court affirmed the California Court of Appeals and held that California's exercise of jurisdiction over two Florida citizens was proper.[101] In reaching this conclusion, the Court relied on three factors: the publication medium,[102] the defendants' knowledge that the plaintiff lived and

99. Hanson v. Denckla, 357 U.S. 235, 251 (1958) (discussing the trend of more frequently allowing states to exercise personal jurisdiction over out-of-state defendants).

100. *See Young*, 315 F.3d at 262–63 (citing ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002) (basing its test on *Calder v. Jones*)) (explaining that a state can exercise personal jurisdiction over a foreign defendant when the defendant manifests an intent to direct his Internet activity at the forum state). As previously mentioned, the North Carolina Court of Appeals adopted the *Young* test in *Dailey*. *See* Dailey v. Popma, 191 N.C. App. 64, 66, 662 S.E.2d 12, 14 (2008).

101. *Calder*, 465 U.S. at 791.

102. *Id.* at 789–90.

worked in California,[103] and the intentional nature of the defendants' actions.[104] These three factors working in concert demonstrated the defendants' intent to target California and made it reasonable for them to foresee being haled into a California court to answer for the effects of their actions.[105] These three factors, when applied to *Dailey*, support a finding that North Carolina can exercise personal jurisdiction over Popma consistent with due process. The defendant's choice of publication medium, knowledge of the plaintiff's location, and intentional actions displayed a purposeful targeting of North Carolina. Because of the convergence of these three factors, the defendant could have foreseen being haled to North Carolina.[106] Although there is a sparse factual record in *Dailey*, the record contains sufficient details to conduct an analysis of these three factors.[107]

A. Publication Medium

When analyzing the target audience of a written statement, a logical place to begin the analysis is with the source of publication. Analyzing the source is a good indication of the target audience for print media that is unavailable except in printed format because the physical distribution area demonstrates the intended target area. If an author wants to target North Carolina with a printed article, he or she must choose a source distributed in North Carolina or the audience will not be able to access the source. Based on the assumed correlation between distribution area and intended target area, it is not surprising that the United States Supreme Court began its opinion in *Calder* by analyzing the scope of the *National Enquirer*'s distribution.[108] The Court noted that the *Enquirer* had its highest circulation in California by a wide margin.[109] The high circulation numbers contributed to the Court's conclusion that the injurious effects would be felt in California.[110]

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103. *Id.*

104. *Id.*

105. *Id.* at 790.

106. *See id.*

107. The defendant did not provide the court with a copy of the bulletin board posts, which is why the record lacks detail. Dailey v. Popma, 191 N.C. App. 64, 72, 662 S.E.2d 12, 18 (2008).

108. *Calder*, 465 U.S. at 784.

109. *Id.* at 785. The *Enquirer* sold 604,431 copies of the September 18, 1979 issue in California and 316,911 in the next highest-selling state, New York. *Id.* at 785 n.2.

110. *Id.* at 789–90. The defendants' knowledge that the plaintiff's professional and personal life was centered in California contributed to this finding. *See id.* The knowledge of a defendant will be discussed later. *See infra* Part II.B.

While Internet sites are not limited to a physical distribution area like print media, they can be linked to a geographic area through their content. For example, the website www.beerinator.com is devoted to the North Carolina beer community.[111] Although this website is accessible from any place in the world, its content demonstrates it is focused on North Carolina.[112] By focusing solely on the general accessibility of websites, the North Carolina Court of Appeals erroneously ignored the geographic focus of the message board used by Popma.[113]

The *National Enquirer* is more similar to the online message board in *Dailey* than one might think. Both are accessible nationally.[114] While the message board is much easier to access, 4,687,769 of the *National Enquirer*'s readers of the September 18, 1979 issue, eighty-nine percent of the total readers of that issue, resided outside of California.[115] Although information on the location of readers of the message board is absent from the record, it seems likely that most reside outside of North Carolina as well. Nonetheless, it is unlikely that more than eighty-nine percent of the message board readers reside outside of North Carolina considering the board's focus on shooting camps in the southeast.[116] The fact that many readers live outside of North Carolina does not mean, by itself, Popma failed to target North Carolina when he participated in the discussion about the plaintiff.[117]

Given the finding that the *National Enquirer* displayed an intent to target California, the bulletin board posts likely displayed an intent to target North Carolina because the bulletin board targeted a regional, rather than a national, audience. Popma participated in a discussion specifically about the plaintiff's shooting camps which were

111. North Carolina's Beer Community, http://www.beerinator.com (last visited Aug. 24, 2009).

112. *See, e.g.*, Foothills Does NC Proud!, North Carolina's Beer Community, *supra* note 111 (Oct. 20, 2008, 10:28 EDT); Triangle Beer Meetup, North Carolina's Beer Community, *supra* note 111 (Aug. 14, 2008, 16:34 EDT).

113. *See* Dailey v. Popma, 191 N.C. App. 64, 73–74, 662 S.E.2d 12, 18–19 (2008) (citing ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 712 (4th Cir. 2002)).

114. *Calder*, 465 U.S. at 785 (stating that the *Enquirer* has a national weekly circulation of five million magazines).

115. *Id.* at 785 n.2.

116. *Dailey*, 191 N.C. App. at 67, 662 S.E.2d at 15.

117. *See Calder*, 465 U.S. at 785, 790 (finding the *National Enquirer's* "intentional, and allegedly tortious, actions were expressly aimed at California" even though a majority of its readers lived outside California).

attended by shooters from across the southeastern United States.[118] By posting on a discussion board about a North Carolina entity whose clients are southeastern shooters, Popma chose a much more targeted medium than the *Enquirer*, which is nationally distributed and has national subjects. Even if the board was on a website devoted to discussing shooting nationally, the defendant chose to post on a discussion with a regional focus, which displays intent to target an area. It is likely that at least a plurality of the readers of this thread would be North Carolina residents because they would be the most familiar with and interested in a local shooting range.[119] *Calder* shows publishing a statement in a medium with a plurality of readers in the forum state is sufficient to demonstrate an intent to target the forum.[120] Since Popma chose a medium where at least a plurality of readers would likely be in North Carolina, the publication medium is sufficiently focused on North Carolina to demonstrate intent to target North Carolina.

In deciding *Dailey*, the North Carolina Court of Appeals relied on *Burleson*, the only case cited by the North Carolina Court of Appeals that applied North Carolina law to Internet posts,[121] which involved an argument identical to that used in *Dailey* to support the exercise of personal jurisdiction.[122] While the court did not find

118. *Dailey*, 191 N.C. App. at 67, 662 S.E.2d at 15. The record does not contain any of the posts Dailey wrote, which limits the analysis. *Id.* at 72, 662 S.E.2d at 18. The lack of facts in the record is one reason why the Supreme Court of North Carolina should remand this case.

119. At least one court, when determining whether a defendant had minimum contacts with North Carolina because of a website, has been willing to assume a substantial number of North Carolina residents read materials posted on a website when the actual number of hits occurring in North Carolina was unknown. *See* Superguide Corp. v. Kegan, 987 F. Supp. 481, 487 (W.D.N.C. 1997) (stating that a defendant purposefully directed activities at North Carolina by advertising its product on a website because a reasonable inference could be made that a substantial number of hits occurred in North Carolina until specific information was available to prove the inference false). *But see* ESAB Group, Inc. v. Centricut, L.L.C., 34 F. Supp. 2d 323, 330 n.4 (D.S.C. 1999) (criticizing *Superguide* as the minority approach). While *Superguide* has been criticized, its inference seems more appropriate for posts on an Internet bulletin board discussion of an entity of the forum rather than for websites that are not related to a geographic location.

120. *See Calder*, 465 U.S. at 784–85 (finding a California court could properly exercise jurisdiction over the defendants although a plurality of the *Enquirer*'s readers were not located in California).

121. 391 F. Supp. 2d 401, 414–15 (M.D.N.C. 2005) (applying the *ALS Scan* test, as modified in *Young*, to determine whether posts on a web forum would support personal jurisdiction in North Carolina).

122. *Dailey*, 191 N.C. App. at 74, 662 S.E.2d at 19. The court in *Dailey* also cited several cases from other jurisdictions. *See id.* at 74–75, 662 S.E.2d at 19–20 (citing Machulsky v. Hall, 210 F. Supp. 2d 531, 542 (D.N.J. 2002); Barrett v. Catacombs Press, 44

personal jurisdiction in *Burleson*,[123] if the publication media are analyzed, *Dailey* is distinguishable from *Burleson*. *Burleson* involved allegedly libelous statements written on an Internet forum[124] which had an entirely different focus than the forum in *Dailey*, as the forum in *Burleson* was designed as a forum for Canadians and grew to have an international audience.[125] Ample evidence showed the forum did not target North Carolina like either the *National Enquirer* targeted California or the bulletin board in *Dailey* targeted North Carolina. Twenty-one to forty-four of the approximately two thousand members of the forum were residents of North Carolina in *Burleson*,[126] and the forum received a minimal amount of revenue from North Carolina.[127] Due to its international focus, the forum in *Burleson*, as a publication medium, did not demonstrate that the defendant targeted North Carolina.[128]

Analyzing the publication medium also differentiates *Dailey* from *Young*, another precedent on which the North Carolina Court of Appeals relied.[129] *Young* involved two Connecticut newspapers, the *New Haven Advocate* and the *Hartford Courant*, which published selected print material on their respective websites.[130] The newspapers wrote articles about the transfer of Connecticut inmates to Virginia prisons[131] and posted these articles on their websites.[132] The plaintiff, the warden of a Virginia prison discussed in the articles, claimed the defendants subjected themselves to personal jurisdiction in Virginia because Virginia residents could access the website articles in Virginia.[133] Unlike *Dailey*, which only involved the Internet message board, the newspapers in *Young* were both physically distributed and available online.[134] While the newspapers were

F. Supp. 2d 717, 728 (E.D. Pa. 1999); Griffis v. Luban, 646 N.W.2d 527, 535–36 (Minn. 2002)).

123. *Burleson*, 391 F. Supp. 2d at 404.

124. *Id.*

125. *Id.* at 412.

126. *Id.* The few members from North Carolina had minimal activity on the board. Only 2.2% of the messages on the forum were written by North Carolina members. *Id.*

127. The forum received $300.00 from North Carolina-related advertising over an eight-year period. *Id.* at 413.

128. *Id.* at 415.

129. Dailey v. Popma, 191 N.C. App. 64, 71–72, 662 S.E.2d 12, 17–18 (2008).

130. Young v. New Haven Advocate, 315 F.3d 256, 259–60 (4th Cir. 2002).

131. *Id.* at 259.

132. *Id.* at 260.

133. *Id.*

134. *Id.*

distributed locally, their websites were accessible globally.[135] Due to the limited distribution area of the print publications, the *Young* court expressed skepticism that the papers established minimum contacts with a forum outside their distribution area merely by maintaining websites.[136] The court proceeded to analyze the content of the websites to determine if the websites targeted an area outside of the physical distribution area,[137] and correctly concluded that the websites targeted the same market as their distribution area because the website content was local.[138] The divergence between the worldwide accessibility of the website and the decidedly local distribution area of the papers prevented the court from finding that the websites displayed an intent to target Virginia. The bulletin board in *Dailey* did not have a sister print publication that targeted a specific geographic area. While a website might not display an intent to target a forum when the forum is outside the distribution area of the website's companion print publication, a website can nonetheless target a specific state when it does not have a companion print publication.

Dailey also asked if the defendant targeted the readers of the forum state through his Internet postings,[139] but this question was unnecessary because of the nature of the bulletin board. A textual analysis was not needed in *Calder* to find that the authors reasonably could have foreseen being haled to California.[140] The court did not need to analyze the text because the *Enquirer* targeted California due to its high circulation in California.[141] The circulation figures were sufficient to prove the authors reasonably should have been able to foresee being haled into California because the brunt of the effect would occur where the *Enquirer* had its highest circulation. Similar to *Calder*, the publication medium in *Dailey* targets North Carolina. Popma did not post on a general thread or a website that lacked a geographical focus. Instead, he posted on a thread specifically

135. The *Advocate* is a free weekly newspaper distributed locally around New Haven, Connecticut. *Id.* at 259. It had no subscribers in Virginia at the time of the suit. *Id.* at 259–60. The *Courant* is published daily and is circulated around Hartford, Connecticut. *Id.* at 260. It had eight subscribers in Virginia when it published the allegedly libelous articles. *Id.*

136. *Id.* at 263.

137. *Id.*

138. *Id.* All of the advertisements, weather, traffic information, and feature stories were focused locally on Connecticut readers. *See id.*

139. Daily v. Popma, 191 N.C. App. 64, 72, 662 S.E.2d 12, 18 (2008).

140. Calder v. Jones, 465 U.S. 783, 789–90 (1983).

141. *Id.*

discussing a North Carolina business. Because the post concerned a North Carolina business, it follows that the readers of the post would likely be from North Carolina.[142] Therefore, a textual analysis of the posts was unnecessary because the publication medium displayed an intent to target North Carolina since the thread specifically discussed a North Carolina entity.[143]

B. Defendant's Knowledge of Plaintiff's Location

What a defendant knew about the plaintiff is relevant to a minimum contacts analysis because the defendant's knowledge will inform where he could have "reasonably anticipated being haled into court."[144] In the context of defamation, the author of the allegedly defamatory statements can assume an individual will suffer the brunt of his injury where his personal or professional life is centered.[145] When a defendant knows where the effects of his actions will be felt, it is reasonable to anticipate being haled to that location to answer for the consequences of those actions. The reasonableness of this belief will not change based on the source used to publish the statements. If a person posts allegedly defamatory statements to a website and knows where the target's personal or professional life is based, then the author could reasonably anticipate being haled there even though the website is omnipresent.

In *Calder*, the defendants knew California was the center of the plaintiff's personal and professional life.[146] Based on that knowledge, the Court found that the defendants knew the effects of their actions would be centered in California.[147] Thus, it was reasonable for the defendants to anticipate being haled to California.[148]

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142. Social psychologists have recognized the importance of proximity in creating affinity. Proximity is important because it encourages familiarity, and familiarity increases positive reactions toward a stimulus. KENNETH S. BORDENS & IRWIN A. HOROWITZ, SOCIAL PSYCHOLOGY 334–35 (2d ed. 2002). Since North Carolinians are closer to the plaintiff's shooting camps, they would most likely have more affinity for his shooting camp. North Carolina readers would be most likely to read the posts because of their affinity and proximity to the camps. *See id.*

143. *See Calder*, 465 U.S. at 789–90.

144. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

145. *See Calder*, 465 U.S. at 789–90; Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 297 F. Supp. 2d 1154, 1165 (W.D. Wis. 2004).

146. *Calder*, 465 U.S. at 789–90.

147. *Id.*

148. *Id.* at 790 ("An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.").

Similarly, in *Bochan v. La Fontaine*,[149] a case involving defamatory statements written on the Internet and an argument for jurisdiction based on *Calder*, the court found the exercise of personal jurisdiction was proper because the defendants knew where the plaintiff lived and worked.[150] The plaintiff, a Virginia resident, alleged that three defendants, Texas and New Mexico residents, defamed him in Virginia by posting libelous messages to the "USENET newsgroup" named *alt.conspiracy.jfk*.[151] Although the court applied the Virginia long-arm statute, the minimum contacts analysis would be the same for a North Carolina court because minimum contacts must comply with constitutional due process limitations.[152] The court found that because the defendants knew the plaintiff lived in Virginia, they knew the predominant effects of their actions would be felt in Virginia.[153] Thus, the court stated that the defendants should have foreseen being haled into court in Virginia.[154]

Considering that many courts frequently find the defendant's knowledge of where the plaintiff lives or works persuasive when evaluating whether exerting personal jurisdiction would be proper,[155] the court in *Dailey* failed to give adequate weight to the fact that Popma knew Dailey operated a shooting camp in North Carolina

149. 68 F. Supp. 2d 692 (E.D. Va. 1999).

150. *See id.* at 702–03.

151. *Id.* at 695. A "USENET newsgroup" has been described in the following manner:

> USENET newsgroups are disseminated using ad hoc, peer to peer connections between approximately 200,000 computers (called USENET "servers") around the world. For unmoderated newsgroups, when an individual user with access to a USENET server posts a message to a newsgroup, the message is automatically forwarded to all adjacent USENET servers that furnish access to the newsgroup, and it is then propagated to the servers adjacent to those servers, etc. The messages are temporarily stored on each receiving server, where they are available for review and response by individual users. The messages are automatically and periodically purged from each system after a time to make room for new messages.

Id. at 695 n.2 (quoting ACLU v. Reno, 929 F. Supp. 824, 835 (E.D. Pa. 1996)).

152. *See Calder*, 465 U.S. at 788.

153. *Bochan*, 68 F. Supp. 2d at 702.

154. *Id.*

155. *See* First Am. First, Inc. v. Nat'l Assoc. of Bank Women, 802 F.2d 1511, 1517 (4th Cir. 1986) (finding the exercise of personal jurisdiction in Virginia proper because the defendant knew that the majority of the harm suffered from libelous letters would be felt where the plaintiff resided and conducted business); Telco Commc'ns v. An Apple a Day, 977 F. Supp. 404, 408 (E.D. Va. 1997) (stating that the defendants' knowledge that the plaintiff's business was based in Virginia contributed to a finding that the defendants should have foreseen being haled into Virginia); Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 609, 334 S.E.2d 91, 93–94 (1985) (finding jurisdiction was constitutional when an out-of-state resident knowingly commits a tort against a North Carolina resident because it "was clear that the alleged tort would have its damaging effect in North Carolina").

when conducting its due process analysis. In his affidavit, Popma stated that he knew the plaintiff conducted shooting camps in Ramseur, North Carolina.[156] The defendant should have known the majority of the effects of his actions would have been felt in North Carolina because he knew that is where the plaintiff worked.[157] Thus, the court should have found it was reasonable for Popma to anticipate being haled into North Carolina to answer for the truth of his statements.[158] The *Dailey* court erred because the defendant's knowledge of the plaintiff's location was not a part of its analysis.[159]

Using the defendant's knowledge of the plaintiff's place of business or residence as a factor in due process analysis will limit the reach of jurisdiction for Internet communications. The court in *Dailey* worried that allowing the "effects" test to support jurisdiction would erode a defense of personal jurisdiction.[160] The court believed a plaintiff would suffer effects in every state due to the omnipresence of the Internet.[161] Thus, the court feared a defendant could be sued anywhere.[162] This fear is ill-founded. First, an individual would suffer most of the effects from libelous statements in the state of his or her residency or principal place of business. Second, the defendant would not foresee being haled into court in a state where the plaintiff does not reside or work. Third, effects alone were never enough to support jurisdiction under the "effects" test set forth in *Calder*.[163] It is the "*Calder* factors" working in concert that allow a defendant to reasonably foresee being haled into the forum.[164] Likewise, because the harm is typically focused in the plaintiff's state of residency or principal place of business, the defendant should foresee being called to that state; but if he is ignorant of the state where the plaintiff resides or works, he cannot foresee being haled into court there. Thus, statements on the Internet will not erode geographical limits on judicial power because a defendant's knowledge about the plaintiff would limit the states where he could foresee being haled into court.

156. Dailey v. Popma, 191 N.C. App. 64, 67, 662 S.E.2d 12, 15 (2008).
157. *See Calder*, 465 U.S. at 790; *Ciba-Geigy*, 76 N.C. App. at 609, 334 S.E.2d at 93–94.
158. *See Calder*, 465 U.S. at 790.
159. *See Dailey*, 191 N.C. App. at 73–75, 662 S.E.2d. at 19.
160. *Id.* at 73, 662 S.E.2d at 18–19.
161. *Id.*
162. *Id.*
163. *See Calder*, 465 U.S. at 788–89; Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 731 (E.D. Pa. 1999).
164. *See Barrett*, 44 F. Supp. 2d at 730–31 (denying jurisdiction although the defendant's libelous statements harmed the plaintiff in Pennsylvania because harm alone is not enough to support jurisdiction).

C. *Intentional Nature of the Action*

It is not surprising that courts are more likely to find that a defendant had minimum contacts with the forum when his contact with the forum is the result of intentional actions as opposed to untargeted negligence. This is because of the fact that nonresident defendants must purposefully avail themselves of the privileges of the forum state in order for a court to find the defendant has minimum contacts with the forum state.[165] A defendant's intentional actions demonstrate purposeful availment.[166] In *Calder*, the defendants analogized themselves to welders who worked on a boiler in Florida which exploded in California.[167] According to the defendants, a court would not grant jurisdiction over welders who had no control over where their employers shipped the boiler.[168] The defendants in *Calder* claimed they lacked control over the circulation of the article in California; thus, they should not be subject to jurisdiction in California.[169] The Court rejected this analogy because, unlike the welders who committed untargeted negligence, the defendants committed intentional actions.[170] The Court held jurisdiction was "proper because of their *intentional* conduct in Florida calculated to cause injury to respondent in California."[171]

Later courts have continued to differentiate between intentional conduct and untargeted negligence. Purposefully circulating magazines in a state was sufficient to support jurisdiction over an out-of-state publisher because the circulation was intentional and not "random, isolated, or fortuitous."[172] One of the factors the North Carolina Court of Appeals used to exert personal jurisdiction over an Indiana resident employed by a Greensboro company was that the Indiana resident intentionally sent fraudulent refund requests to the company's office in North Carolina over a two-year period.[173] Courts are more likely to find that personal jurisdiction exists when the

165. *See Calder*, 465 U.S. at 789.

166. *See* Carswell Distrib. Co. v. U.S.A.'s Wild Thing, Inc., 122 N.C. App. 105, 109, 468 S.E.2d 566, 569 (1996); New Bern Pool & Supply Co. v. Graubart, 94 N.C. App. 619, 626, 381 S.E.2d 156, 160 (1989).

167. *Calder*, 465 U.S. at 789.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 791 (emphasis added). As discussed above, the defendants' choice of publication medium and knowledge that the plaintiff lived and worked in California demonstrated the injury was calculated to cause injury in California. *See supra* Part II.A–B.

172. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984).

173. Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 605–06, 334 S.E.2d 91, 92 (1985).

defendant acted intentionally because the defendant's intentional actions demonstrate that the defendant purposefully availed himself of the privileges of the forum state.[174]

By ignoring the intentional nature of Popma's actions, the North Carolina Court of Appeals incorrectly affirmed a dismissal based on the defendant's assertion of a lack of personal jurisdiction. Popma is not like a welder who committed "untargeted negligence."[175] Popma intentionally wrote the posts about someone he knew worked in North Carolina. Popma also intentionally chose a medium directed at North Carolina. Since Popma's contact with North Carolina was not random or fortuitous, the court should have found that the defendant was subject to personal jurisdiction in North Carolina.[176]

Since Popma satisfied each of the three "*Calder* factors," it would have been reasonable for him to anticipate being haled to North Carolina. Popma chose a publication medium that would focus the effects of his statements in North Carolina by writing on a thread discussing Dailey's shooting camps. He knew Dailey worked in North Carolina, so he knew his statements impugning the plaintiff's professional activities would have their effect in North Carolina. Lastly, he acted intentionally. He should have foreseen being haled to North Carolina because he intentionally wrote messages about someone he knew to be a North Carolina resident on an Internet bulletin board discussing that person. Therefore, the exercise of personal jurisdiction in North Carolina would be consistent with due process limitations.

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174. *See* Summit Lodging, L.L.C. v. Jones, Spitz, Moorhead, Baird & Albergotti, P.A., 176 N.C. App. 697, 703, 627 S.E.2d 259, 264–65 (2006) (allowing North Carolina to exert personal jurisdiction over a South Carolina law firm because the law firm filed the plaintiff's Articles of Organization with the North Carolina Secretary of State, called various persons in North Carolina, sent letters to North Carolina, and wrote emails to persons in North Carolina); CFA Med., Inc. v. Burkhalter, 95 N.C. App. 391, 395, 383 S.E.2d 214, 216 (1989) ("Which party initiates the contact is taken to be a critical factor in assessing whether a non-resident defendant has made 'purposeful availment.' " (citing Cameron-Brown Co. v. Daves, 83 N.C. App. 281, 287, 350 S.E.2d 111, 115–16 (1986))); Brickman v. Codella, 83 N.C. App. 377, 383–84, 350 S.E.2d 164, 168 (1986); *see also* Cambridge Homes of N.C. v. Hyundai Constr., Inc., __ N.C. App. __, __, 670 S.E.2d 290, 297 (2008) (finding that North Carolina could not exert jurisdiction over a foreign defendant even though the defendant entered into a contract with a North Carolina entity because the defendant did not "initiate" any of the contacts with North Carolina).

175. *See Calder*, 465 U.S. at 789–90.

176. *See Keeton*, 465 U.S. at 774 (finding the requirements of minimum contacts are met when the defendant's contacts with a forum are neither "random, isolated, or fortuitous").

III. NORTH CAROLINA'S INTEREST IN PROTECTING ITS CITIZENS

Once a defendant has established minimum contacts with the forum state, the minimum contacts can be viewed in light of other factors to determine if the exercise of personal jurisdiction would offend traditional notions of " 'fair play and substantial justice.' "[177] One of the fairness factors a court considers is " 'the forum State's interest in adjudicating the dispute.' "[178] Fairness factors sometimes allow the exercise of personal jurisdiction to pass constitutional due process requirements upon a lesser showing of contacts than would normally be required.[179]

As shown in the preceding sections, Dailey had minimum contacts with North Carolina; therefore, it is proper to consider whether North Carolina's exercise of personal jurisdiction would offend "traditional notions of fair play and substantial justice" when considered with North Carolina's interest in adjudicating the dispute.[180] North Carolina has a strong interest in adjudicating this dispute based on its interest in protecting its citizens from tortious acts of out-of-state individuals.[181] The North Carolina Court of Appeals has said that the court is more willing to find assertions of jurisdiction constitutional in tort cases because of the strong public interest a state has in protecting its citizens from out-of-state tortfeasors.[182] As discussed above, Internet harassment poses a real threat to citizens.[183] Because Popma had minimum contacts with North Carolina, the state's strong public interest in protecting Dailey from Internet harassment provides additional support for allowing North Carolina to exercise jurisdiction over Popma.[184]

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177. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)).

178. *Id.* at 477 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)). Another fairness factor is the "convenience of the forum to the parties." Banc of Am. Secs., v. Evergreen Int'l. Aviation, Inc., 169 N.C. App. 690, 699, 611 S.E.2d 179, 186 (2005).

179. *See Keeton*, 465 U.S. at 779–80.

180. *Burger King*, 471 U.S. at 476 (quoting Int'l. Shoe Co. v. Washington, 326 U.S. 310, 345 (1945)).

181. *See* Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 608, 334 S.E.2d 91, 93 (1985).

182. *Id.* at 608, 334 S.E.2d at 93; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 36 cmt. c (1989) ("A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort.").

183. *See supra* notes 1–18 and accompanying text.

184. *See Burger King*, 471 U.S. at 477.

CONCLUSION

The United States Supreme Court has recognized that the standards used to determine the proper exercise of personal jurisdiction must adapt to changes in technology, but courts must maintain the constitutional limits on a state's power to exert jurisdiction over an out-of-state defendant. In *Hanson v. Denckla*,[185] the Court stated:

> As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff* to the flexible standard of *International Shoe Co. v. Washington*. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.[186]

Using the "*Calder* factors" to analyze whether statements written on the Internet can give rise to personal jurisdiction will strike the required balance between flexibility and retaining limitations on jurisdiction. These factors provide criteria to evaluate the circumstances surrounding Internet communications. These criteria will provide flexibility in a jurisdiction by highlighting similarities Internet communications can have with previous communications that supported jurisdiction. These criteria were useful in highlighting similarities between the bulletin board in *Dailey* and articles published in the *National Enquirer*. These criteria will provide limitations because when fewer criteria are present jurisdiction is less likely to comply with due process requirements.[187]

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185. 357 U.S. 235 (1958).

186. *Id.* at 250–51 (citation omitted).

187. *Compare* Burleson v. Toback, 391 F. Supp. 2d 401, 415 (M.D.N.C. 2005) (denying personal jurisdiction in North Carolina based on statements written on an Internet message board where only twenty-two to forty-four out of roughly 2000 members were North Carolinians and the defendants apparently did not know the plaintiff was a North Carolina resident), *with* Bochan v. La Fontaine, 68 F. Supp. 2d 692, 702 (E.D. Va. 1999) (allowing the exercise of jurisdiction over out-of-state defendants because it was reasonable for the defendants to anticipate being haled to Virginia when they intentionally wrote about someone they knew to be a Virginia resident).

Thus, the Supreme Court of North Carolina should remand the decision to dismiss *Dailey v. Popma* because of a lack of personal jurisdiction so that the record can be developed consistent with the "*Calder* factors." While Internet communications may not as clearly demonstrate an intent to target a state as older forms of communication, "we are concerned solely with 'minimum' contacts, not the 'best' contacts."[188] Although Dailey may not have had the best contacts with North Carolina, he likely had minimum contacts so that he could have reasonably foreseen being haled to North Carolina to answer for his statements.[189]

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188. Shaffer v. Heitner, 433 U.S. 186, 228 (1977) (Brennan, J., dissenting).
189. *See id.*